Supreme Court, U.S.
FILED
AUG 11 1995

No. 94-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JERSEY CENTRAL POWER & LIGHT COMPANY,

Petitioner,

vs.

FREEHOLD COGENERATION ASSOCIATES, L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

STEVEN E. GREENBAUM
(Counsel of Record)
JOHN P. BIEDERMANN
BERLACK, ISRAELS & LIBERMAN LLP
120 West 45th Street
New York, New York 10036
(212) 704-0100

Attorneys for Petitioner Jersey Central Power & Light Company

August 11, 1995

BEST AVAILABLE COPY

11 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
REPLY BRIEF FOR PETITIONER	1
CONCLUSION	8

TABLE OF AUTHORITIES

FEDERAL CASES **Page**

American Paper Institute, Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983)..... 5

Bristol Energy Corp. v. New Hampshire Pub. Utils. Comm'n, 13 F.3d 471 (1st Cir. 1994)..... 6

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992)..... 6

Connecticut Light and Power Co., 70 FERC ¶ 61,012 (1995), *rehearing denied*, 71 FERC ¶ 61,035 (1995)..... 3, 5

Independent Energy Producers Ass'n, Inc. v. California Pub. Utils. Comm'n, 36 F.3d 848 (9th Cir. 1994)..... 6

Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995)..... 7

West Penn Power Co., 71 FERC ¶ 61,153 (1995)..... 3, 4 n.5

STATE STATUTES

N.J. Stat. Ann. 48:2-40 (West 1994)..... 7

LEGISLATIVE AND REGULATORY MATERIALS

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214 (Feb. 25, 1980)..... 5

No. 94-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JERSEY CENTRAL POWER & LIGHT COMPANY,

Petitioner,

vs.

FREEHOLD COGENERATION ASSOCIATES, L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

1. Rather than address directly the importance of this case, Freehold[1] starts with an attempt to enlist the support of both its primary adversary below, the New Jersey Board of Public Utilities (the "Board"), and the FERC. *See* Respondent's Brief In Opposition To Petitions For A Writ Of Certiorari ("Brief In Opposition"), pp. 14-15. That effort fails, as *neither*

[1] Each capitalized term used herein shall have the meaning ascribed to it in Jersey Central Power & Light Company's ("JCP&L") Petition For A Writ Of Certiorari, dated June 2, 1995 (the "JCP&L Petition").

regulatory body supports Freehold — or the Third Circuit — on the merits.

The fact that the Board chose — for whatever reason — not to file a separate "brief in response to the Petition"[2] herein cannot be manipulated into the Board's "acceptance of the Third Circuit's decision." Brief in Opposition, p. 15. Rather than ascribe substantive meaning to the Board's procedural determination, this Court should heed the Board's express repudiation of the decision below:

> [The Board] is taking the extraordinary step of seeking reconsideration *in banc* of the Circuit Court's decision because of the significance of this issue both as a matter of law and as a matter of practical effect on the State of New Jersey, its electric utilities and its ratepayers. . . . [T]he Circuit Court's conclusory finding that the Board is preempted under Section 210(e) of PURPA from conducting a fact finding proceeding to consider whether it can and should reconsider its prior Order approving and allowing rate recovery for a PPA where the Board-approved rate exceeds the maximum PURPA rate, constitutes an incorrect reading of PURPA, affording undue protection to QFs contrary to the express requirements of Section 210(b) of PURPA and to the detriment of consumers.[3]

There also is no reason to believe that FERC endorses the Opinion. In recent decisions, FERC unambiguously has espoused *JCP&L's* answer to the first question presented herein, holding that the States have no authority to "prescribe

---

[2] *See* Board letter of June 26, 1995 to the Clerk of this Court. Contrary to Freehold's suggestion (Brief in Opposition, p. 14 n.4), the Board has not foresworn filing a brief on the merits if the JCP&L Petition is granted.

[3] Petition And Appendix Of Defendant-Appellee Board Of Regulatory Commissioners Of The State Of New Jersey For Rehearing, With Suggestion For Rehearing *In Banc*, dated January 23, 1995 (the "Board Motion"), p. 2; *see id.* at 8-14.

rates for sales by QFs . . . that exceed the avoided cost cap contained in PURPA." *Connecticut Light and Power Co.*, 70 FERC ¶ 61,012, at 61,029 (1995). Similarly, FERC's deference to New Jersey's regulators on the "merits" of this case — *i.e.*, to determine whether, *inter alia*, the Board had erred in its prior approval of rates in excess of avoided cost — is entirely consistent with JCP&L's assertion that this dispute under PURPA must be adjudicated by the State commission.[4] *See id.* (whether rates "do or do not exceed avoided cost . . . is a matter . . . best left to the appropriate state . . . forum"); *West Penn Power Co.*, 71 FERC ¶ 61,153, at 61,495 (1995) ("It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements"; "whether the particular facts applicable to an individual QF necessitate modifications of . . . the QF's contract with the purchasing utility is a matter for the States to determine").

Freehold's citation (Brief in Opposition, p. 15) to FERC's decision denying rehearing of the *Connecticut Light and Power* case is particularly curious. To be sure, FERC found some "support" in the Third Circuit's general discussion of PURPA for FERC's "conclusion" that "states cannot, consistent with the express language of PURPA and the Commission's regulations, require rates that exceed avoided cost for QF sales at wholesale." 71 FERC ¶ 61,035, at 61,151-61,152 (1995). But, the question *here* is whether the Third Circuit, *despite* its apparent recognition of that core principle, nevertheless improperly countenanced a violation of PURPA's strict avoided cost ceiling. The answer is a resounding and indisputable "yes," thus revealing that the Opinion conflicts

---

[4] Rather than support Freehold below, FERC took no position on "any merits issue" in the case, in part due to FERC's correct conclusion that such issues should be decided "under state law." *See* Brief in Opposition, App. G, at G-25 n.8.

directly with FERC's holding regarding the preemptive effect of PURPA § 210(b).[5]

Having mischaracterized the regulators' views, Freehold itself never squarely argues that PURPA immunizes from review a violation of PURPA § 210(b). Instead, Freehold employs a second tactic calculated to deflect attention from that question. It cites to cases in which a utility claimed "that changed circumstances — *i.e.*, decreases in [the utility's] projections of avoided cost from those contained in [sic] power purchase contract with the QF — justified reduction of the rates [the utility] paid under that contract." Brief in Opposition, p. 19; *see id.* at 18, 21. Then, Freehold "buttresses" these citations with the conclusory assertion — raised for the first time in the Brief in Opposition (p. 19) — that, when the Board approved the PPA in 1992, there was no suggestion "that [Freehold's] rate exceeded [JCP&L's then-current] avoided cost."

This diversionary strategy is to no avail because JCP&L does not rely on a claim of "changed circumstances." Rather, JCP&L always has claimed — and it is indisputable — that the Board approved rates in 1992 that exceeded JCP&L's avoided cost forecast *at that time*. Indeed, the record reveals that, in June 1992, JCP&L submitted to the Board a comparison of Freehold's prices to JCP&L's then-current avoided cost forecast, showing that Freehold's rates exceeded avoided cost by approximately $165 million, net present value. *See* JCP&L Petition, pp. 6-7. The Board itself now has acknowledged its initial error in approving Freehold's prices one month *after* receiving this cost comparison, and the Board has asserted, correctly, that its Approval Order thus violated PURPA § 210(b) and should now be reconsidered. Board

---

[5] FERC recently has repudiated another critical aspect of the Opinion. After the Third Circuit ruled that the Board was preempted from directing parties "to negotiate an appropriate buyout of the PPA" (App. A-20), FERC urged State commissions to help utilities "buy out or buy down such [overpriced QF] contract[s]." *West Penn Power Co.*, 71 FERC ¶ 61,153, at 61,497.

Motion, pp. 2, 8, 9. Such a result, JCP&L submits, is required by the statute and the underlying regulations, by this Court's decision in *American Paper Institute, Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983), and by FERC's ruling in *Connecticut Light and Power*.

2. Freehold cites no support in the statute, the regulations, or the decisional authority, for its one-line conclusion that the Board's fact finding proceeding "constituted regulation of Freehold's rates" for purposes of PURPA § 210(e). Brief in Opposition, p. 26. Freehold does, however, devote a footnote to a critique of JCP&L's use of the phrase "utility-type regulation" as a short-form expression of what it is that Congress intended to preempt by that statutory section, and Freehold chides JCP&L for asserting that PURPA § 210(e) was intended to exempt QFs from traditional "cost-of-service" regulation. Brief in Opposition, p. 26 n.9.

There is ample support for JCP&L's proposition that PURPA § 210(e) is far from a blanket preemption of all State regulatory activities relating to QFs. Freehold itself quotes extensively from the conference committee report accompanying PURPA, to the effect that Congress's intent was to protect QFs from "the type of examination that is traditionally given to electric utility rate applications," including inquiries into the "rate of return on their activities"; the committee report, Freehold notes, went on to call such inquiries "utility-type regulation." Brief in Opposition, pp. 5-6. Interpreting these legislative materials, FERC perceived that § 210(e) "is intended to exempt qualifying facilities from the cost-of-service regulation by which electric utilities traditionally have been regulated." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,222 (Feb. 25, 1980).

Thus, Congress and FERC *both* confined the preemptive effect of § 210(e) to traditional "utility-type" regulation — *i.e.*, cost-of-service inquiries. The Third Circuit erred by expanding beyond recognition or rationale that limited, express

preemption. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted"). As such, the Opinion also conflicts with two Circuit Court decisions holding that certain intrusive inquiries into a QF's financial and operational affairs did not constitute "utility-type" regulation for purposes of PURPA § 210(e). *Bristol Energy Corp. v. New Hampshire Pub. Utils. Comm'n*, 13 F.3d 471, 475 (1st Cir. 1994) (a State commission's concededly intrusive request for financial information from a QF is not preempted by § 210(e)); *Independent Energy Producers Ass'n, Inc. v. California Pub. Utils. Comm'n*, 36 F.3d 848, 859 (9th Cir. 1994) (State commission requirement that "QFs . . . submit operational data to the utilities for monitoring . . . is not pre-empted").[6]

In making its point about "utility-type" regulation, Freehold repeatedly mischaracterizes the nature of the Board proceeding. While Freehold's petition to the Board sought to modify the PPA and expressly put Freehold's rates in issue (J.A. 313-19), the Board did not commence a proceeding "to modify the PPA" or to "modify [or reform] the rates" therein. *See* Brief in Opposition, pp. (i), 13, 17, 19, 21, 25, 26 & n.9, 27, 28. Rather, under the auspices of applicable State law, the PPA, and PURPA itself — which demands continuing implementation of FERC's rate-related rules and State adjudication of disputes thereunder — the Board was considering "whether its previous approval of this [PPA] should be modified or otherwise reconsidered or revoked." *See* Brief in Opposition, App. D, at D-13. PURPA mandates nothing less.

3. Freehold repeatedly invokes the mantra "final and non-appealable" in connection with the Approval Order as a

---

[6] Given that these decisions rejected preemption claims under § 210(e), it is disingenuous (and inexplicable) for Freehold to claim that the Opinion is "consistent" with *Bristol Energy* and *Independent Energy Producers*. Brief in Opposition, pp. 15-16, 24-25.

basis for the denial of JCP&L's Petition. *See* Brief in Opposition, pp. 2, 10, 11, 16, 17, 21. In so doing, Freehold conveniently ignores the fact that *it* filed the petition requesting that the Board approve a modification of the PPA and Freehold's rates. Freehold should be estopped from arguing that the fact finding proceeding that emanated from its own petition was somehow barred by the "finality" of the Board's prior Approval Order.

In any event, Freehold simply is wrong in attempting to attach the "final and non-appealable" label to the Board's order approving the PPA. As this Court recently noted, "finality of a legal judgment is determined by statute." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995). By statute, New Jersey provided for reconsideration "at any time" of the Board's 1992 Approval Order. N.J. Stat. Ann. 48:2-40 (West 1994). Therefore, that order was not "final" in the only relevant sense.

4. Finally, there is Freehold's continuing contention that it brought this "action under Section 210(e) of PURPA" so that § 210(g) did not divest the federal courts of jurisdiction. Brief in Opposition, pp. 23-25. JCP&L agrees that the appropriate test is whether this case in any way "involv[es] rules implementing" PURPA §§ 210(a) or 210(f); if so, there is no jurisdiction. *Id.* at 24 (quoting *Bristol Energy Corp. v. New Hampshire Pub. Utils. Comm'n*, 13 F.3d at 474). With respect to the application of that test to the instant dispute, the Brief in Opposition itself makes JCP&L's case.

Freehold supports the Third Circuit's preemption ruling principally by arguing that its rates were "locked-in" — *i.e.*, immune from post-approval Board inquiry — by "FERC's rules under Section 210(a)." Brief in Opposition, pp. i, 4-8, 15-16, 18-19, 21, 25. It thus is undeniable that this is a case "involving rules implementing" § 210(a). Accordingly, § 210(g) precludes the federal courts from exercising jurisdiction.

CONCLUSION

The decision below cannot be squared with the relevant statute, the regulations, or the decisions of this Court, other Courts of Appeals, or FERC. Accordingly, and due to the enormous, unchallenged significance of the issues presented, this Court should grant the JCP&L Petition and reverse.

Respectfully submitted,

STEVEN E. GREENBAUM
(Counsel of Record)
JOHN P. BIEDERMANN
Berlack, Israels & Liberman LLP
120 West 45th Street
New York, New York 10036
(212) 704-0100

Attorneys for Petitioner
Jersey Central Power & Light Company

August 11, 1995